DEPARTMENT OF LAW
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February 13, 1978

Honorable James J. Sossaman
Majority Whip
Arizona House of Representatives
House Wing, State Capitol
Phoenix, Arizona 85007

Re: 78- 24 (R77-338)

Dear Representative Sossaman:

This letter is in response to your request for an opinion from this Office regarding the following question:

> Does A.R.S. § 4-244, paragraph 20, as amended by Laws 1977, Chapter 103, legally preclude a political subdivision of this state from enacting and enforcing an ordinance to prohibit the consumption of spirituous liquor (including a malt beverage) from a broken package in a public park or recreation area of the locality? In particular, does the new language of A.R.S. § 4-244, paragraph 20, merely allow consumption of a malt beverage in a public recreation area unless a city ordinance is passed to proscribe such conduct?

A.R.S. § 4-244.20 states that it is unlawful "[f]or a person to consume spirituous liquor from a broken package in a public place, thoroughfare or gathering." Exempted from this unlawful act, however, are persons "consuming a malt beverage from a broken package in a public recreation area. . ."

Since the term "political subdivision" has not been defined in your question, we assume that you are referring to municipal corporations. A municipal corporation is a creature of the state and, as such, its powers are derived exclusively from the laws of the state and are conferred by its charter or the constitutional or statutory laws which create it. 62 C.J.S., Municipal Corporations, § 107 (1949). A municipal

corporation, therefore, may possess and exercise only such powers as are expressly or by reasonable implication conferred upon it by the state. Town of Holbrook, et al. v. Nutting, 57 Ariz. 360, 114 P.2d 226, 227 (1941). Arizona laws generally provide that municipalities may only confer upon themselves those powers that are consistent with the constitution and laws of this State. See Ariz. Const. Art. 13, Sec. 2 and Arizona Revised Statutes Title 9.

With respect to the subject matter of your question, Arizona courts have clearly determined that when the legislature enacts a general law of statewide concern, and it is apparent that the legislature has preempted or appropriated the field and thereby set down the rule, the legislature's declarations are binding throughout the State and all municipalities are precluded from legislation upon the same subject matter, although municipalities are not precluded from enacting provisions on the same subject matter which go beyond and are more stringent or restrictive than those enacted in State statutes. Harrison v. Laveen, 67 Ariz. 337, 195 P. 2d 562 (1948), City of Phoenix v. Breuninger, 50 Ariz. 372, 72 P. 2d 580 (1937), American La-france, etc., Corporation v. City of Phoenix, 47 Ariz. 133, 54 P. 2d 258 (1936), State v. Jaastad, 43 Ariz. 458, 32 P.2d 799 (1934), Clayton v. State, 38 Ariz. 125, 297 P. 1037 (1931) and Shaffer v. Allt, 25 Ariz. App. 565, 545 P.2d 76 (1976).

Thus the initial issue raised by your question is whether A.R.S. § 4-244.20 is a general law of statewide concern and whether it is apparent that the legislature has preempted the field to the exclusion of municipalities; if so, then we must deal with the additional issue of whether municipalities could enact more stringent or restrictive provisions.

As stated in Harrison, supra, there is a "twilight zone" wherein it is difficult to discern with positive assurance that legislation is of general concern or is merely of local or municipal concern. We view the subject legislation in this instance as falling within that zone. We are aware that Arizona courts have stated that in certain instances State liquor laws create and establish statewide control over the traffic in intoxicating liquors. This is clearly set forth in DeConcini v. Gatewood, 10 Ariz. App. 274, 458 P.2d 368 (1969) and Mayor and Common Council of the City of Prescott v. Randall, 67 Ariz. 369, 196 P. 2d 477 (1948). However, we believe this

rule was determined more in the light of regulations licensing the sale and purchase of such beverages rather than the consumption of them which appears to be the subject matter of A.R.S. § 244.20.

In DeConcini the court - after setting forth the above rule - held valid a city ordinance which prohibited loitering in or around a bar "after hours," for the following reason:

> The subject ordinance in no way interferes with the sale of intoxicating beverages during the hours permitted by State law. While one of the objects of the ordinance is undoubtedly to prevent illegal trafficking in liquor, after hours, we cannot say that this is its only purpose. Very little good comes from intoxicating liquor and bars and taverns are productive of or associated with various types of activities regarded as antisocial, such as breaches of the peace, gambling and prostitution. So long as the ordinance does not interfere with the regulated trafficking in liquor, as permitted by State law and regulation, we see no transgression upon the State Liquor Code, but rather an attempt by the City to preserve its moral standards.
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> The ordinance that was struck down in the City of Prescott was one that would have directly countermanded the licensing decisions made by the State Department - - not so here. (Emphasis supplied.)

We think this reasoning is applicable in the instant situation. In our opinion, restrictions on the consumption of spirituous liquor in public recreation areas are a matter of municipal or local concern and it is not apparent to us that

the legislature intended by this statute to preempt this field.[1] It is, therefore, our conclusion that a municipality can enact more stringent or restrictive provisions than contained in A.R.S. § 4-244.20.

Respectfully submitted,

BRUCE E. BABBITT
Attorney General

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[1] In this regard it is interesting to note that in the first sentence of A.R.S. § 244.20 the legislature used the term "spirituous liquor" in prohibiting consumption from a broken package in a public place, but in stating that the paragraph did not apply to consumption in a public recreation area, the term "malt beverage" was used. In A.R.S. § 4-101.15 spirituous liquor is defined as including a malt beverage but it is obvious from this definition that a malt beverage does not include all spirituous liquor nor is the term "malt beverage" defined in the code. We conclude from this that the legislature did not intend to preempt the field in allowing consumption of "spirituous liquor" in public recreation areas, and therefore a municipal law prohibiting consumption of "spirituous liquor" would be consistent and not in conflict with A.R.S. § 4-244.20.

In addition A.R.S. § 36-2031 prohibits a municipality from adopting or enforcing any law that includes being a common drunkard or being found in an intoxicated condition but specifically reserves to municipalities the power to adopt laws regarding the possession or use of alcoholic beverages at stated times and places. This statute gives further support to the position that the legislature has not, in enacting A.R.S. § 4-244.20, preempted the field in regard to allowing the consumption of spirituous liquor in a public recreation area.